

1  
2  
3  
4  
5  
6  
7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10

11 GLYNIS ALBERTS-WOOD,  
12 Plaintiff,

NO. CIV.S-04-2194 GEB DAD PS

13 v.

FINDINGS AND RECOMMENDATIONS

14 JOSE FREMONDE, et al.,  
15 Defendants.

16 \_\_\_\_\_/

17 This matter came before the court on February 18, 2005, for  
18 a Status (Pretrial Scheduling) Conference. There was no appearance  
19 on behalf of plaintiff. Defendant Jose Fremonde, proceeding pro se,  
20 appeared on his own behalf. There was no appearance on behalf of  
21 defendant Juan Fremonde

22 Defendants removed this action from state court by a notice  
23 of removal filed on October 15, 2004. However, as discussed at the  
24 status conference, as a general rule an action is removable to a  
25 federal court only if it might have been brought there originally.  
26 28 U.S.C. § 1441(a). Absent jurisdiction based on diversity of

1 citizenship, an action is removable to federal courts if it arises  
2 "under the Constitution, laws, or treaties of the United States." 28  
3 U.S.C. § 1441(b). However, "the mere presence of a federal issue in  
4 a state cause of action does not automatically confer federal-  
5 question jurisdiction." Merrell Dow Pharmaceuticals, Inc. v.  
6 Thompson, 478 U.S. 804, 813 (1986). A "substantial, disputed  
7 question of federal law is a necessary element of one of [the  
8 plaintiff's] well-pleaded state claims[.]" Franchise Tax Board of  
9 California v. Construction Laborers Vacation Trust for Southern  
10 California, 463 U.S. 1, 13 (1983).

11         The existence of a defense or counterclaim that raises a  
12 federal question does not give rise to federal question jurisdiction  
13 and thus may not provide a basis for removal. See Caterpillar Inc.  
14 v. Williams, 482 U.S. 386, 393 (1987); Franchise Tax Board of  
15 California, 463 U.S. at 10; Rath Packing Co v. Becker, 530 F.2d 1295,  
16 1303-04 (9th Cir. 1975). The court's jurisdiction is determined by  
17 looking to the plaintiff's well-pleaded complaint. The "well-pleaded  
18 complaint rule" provides that federal jurisdiction exists "only when  
19 a federal question is presented on the face of the plaintiff's  
20 properly pleaded complaint." Caterpillar, 482 U.S. at 392. The rule  
21 makes the plaintiff the "master of the claim; he or she may avoid  
22 federal jurisdiction by exclusive reliance on state law." Id.  
23 (citations omitted). Thus, a plaintiff may by the allegations of his  
24 or her complaint determine whether his or her case is removable to  
25 the federal courts. See id. at 392 n.7 (citing Great North R. Co. v.  
26 Alexander, 246 U.S. 276, 282 (1918)).

1 Finally, "[i]f at any time before final judgment it appears  
2 that the district court lacks subject matter jurisdiction, the case  
3 shall be remanded." 28 U.S.C. § 1447(c). Whether or not a party  
4 questions the court's subject matter jurisdiction, the court is  
5 required to raise and address the issue sua sponte. Fed. R. Civ. P.  
6 12(h)(3); FW/PBS, Inc v. City of Dallas, 493 U.S. 215, 231 (1990);  
7 Washington Local Lodge No 104 v International Brotherhood of  
8 Boilermakers, 621 F.2d 1032, 1033 (9th Cir. 1980).

9 At the status conference the court indicated that it  
10 appears from the face of plaintiff's state court complaint that this  
11 court lacks subject matter jurisdiction over this matter.  
12 Nonetheless, out of an abundance of caution the court granted  
13 defendants a period of ten (10) days within which to file a response  
14 setting forth any contentions as to why subject matter jurisdiction  
15 exists. Defendants timely filed such a response. However, that  
16 response, along with the allegations of plaintiff's complaint, only  
17 confirm that this matter is a garden variety unlawful detainer action  
18 which is properly resolved in state court.

19 Accordingly, IT IS HEREBY RECOMMENDED that:

20 1. This state civil action be summarily remanded to the  
21 Sacramento County Superior Court; and

22 2. The Clerk be directed to close this case.

23 These findings and recommendations are submitted to the  
24 United States District Judge assigned to the case, pursuant to the  
25 provisions of 28 U.S.C. § 636(b)(1). Within ten (10) days after  
26 being served with these findings and recommendations, any party may

1 file written objections with the court and serve a copy on all  
2 parties. Such a document should be captioned "Objections to  
3 Magistrate Judge's Findings and Recommendations." The parties are  
4 advised that failure to file objections within the specified time may  
5 waive the right to appeal the District Court's order. See Martinez  
6 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 DATED: July 21, 2005.

8   
9 \_\_\_\_\_  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

10 DAD:th  
11 DDad1\orders.prose\alberts2194.f&r.remmand  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26